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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 69

AMERICAN STEVEDORES, INC.,

Petitioner,

v.

ROSARIO PORELLO

and

UNITED STATES OF AMERICA,

Respondents.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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American Stevedores, Inc., by order of this Court (R. 113) granting certiorari, appeals from an order of the Circuit Court of Appeals, 2nd Circuit, modifying, and as so modified, affirming a decree of the United States District Court for the Southern District of New York (R. 91).

Opinions Below

The opinion of December 4, 1944 of the United States District Court for the Southern District of New York is not officially reported but appears at pages 68-71 inclusive of the record. The opinion of the Circuit Court of Appeals, 2nd Circuit, is officially reported at 153 F. (2d) 605.

Jurisdiction

The jurisdiction of this Court to entertain this appeal is provided by Section 240 (a) of the Judicial Code, Section 347 (a) of Title 28 of the United States Code and by Supreme Court Rule 38, par. 5(b).

Statement of the Case

On September 23, 1942, the petitioner under a stevedoring contract with the United States (R. 14), known as a "Warshipsteve" contract, was loading the Navy Transport "Thomas Stone", owned by the United States (R. 13). Said transport was loaded with various supplies, military vehicles, and troops (R. 21, 41, 44) and an army officer had been assigned to the vessel as troop transport quartermaster (R. 44). He was supervising the loading of the vessel (R. 80) so that the cargo could be discharged "when the vessel went into action" (R. 27). The naval transport "Thomas Stone" was an "invasion ship" (R. 79).

One of petitioner's employees, Rosario Parello, while stowing cargo in the No. 1 hold of said vessel, was injured when a strongback or thwartship beam, together with several hatch covers, was caused to fall into the hold (R. 86).

The plans of this vessel called for a locking device to hold this strongback in place, but none was installed by the United States and, as the Circuit Court of Appeals found, no explanation for its absence was proffered by the United States (R. 87).

A military vehicle had been lowered into the hold of the vessel and had been landed upon the tank top preparatory to its being moved into a wing of the vessel's No. 1 hatch (R. 50, 87). In order to move this vehicle,

Di Mare, foreman of the hatch gang and an employee of the petitioner, ordered the vehicle raised (R. 51). After a repeat order, the vehicle was raised and in so doing it came in contact with this strongback and unseated it, precipitating it and several hatch covers into the hold striking Porello (R. 52, 87).

Porello brought an action on March 29, 1943, *in admiralty*, against the United States in the United States District Court for the Southern District of New York under the Suits in Admiralty Act (R. 2). Thereafter, an amended libel was filed (R. 9) and recited that the action was brought under the Public Vessels Act, 46 U. S. C. A. Sec. 781 (R. 9). The United States impleaded the petitioner herein under General Admiralty Rule 56 (R. 13), alleging that, if any negligence be established, it was solely American Stevedores, Inc., who was negligent and that it had agreed under its "Warshipsteve" contract to "be responsible for injury to persons through the negligence or fault of the Stevedore, his employees and servants" (R. 14).

Between the date of the accident, September 23, 1942, and July 30, 1943 (10 months), Porello received compensation benefits and medical attention aggregating $1,421.77, under the Longshore Act (R. 70, 80). These payments were not made under an award but they were retained by Porello (R. 81, 70). In fact, as appears from the foregoing, Porello received compensation for four months after the institution of his suit and retained the same (R. 76, 77).

The Trial Court found, upon the evidence adduced, that the United States had been negligent in that the beam or strongback contained only one locking device and was therefor defective (R. 70) and that the petitioner herein, having knowledge of that, had been negligent in the manner in which the cargo had been handled (R. 71). For the concurrent negligence, as so found, the Trial Court decreed that the libellant fully recover against

the United States and that the United States of America have *contribution* from the petitioner herein for one-half so paid (R. 72). A credit for the compensation benefits of $1,421.77 was allowed the petitioner herein (R. 70). The United States of America and the petitioner herein appealed (R. 73, 83) from such final decree (R. 71, 72) and the libellant filed assignments of error respecting the inadequacy of the award of damages.

The Circuit Court of Appeals, in agreeing with the Trial Court, held the absence of the lock and Di Mare's negligent handling of the cargo operated concurrently in producing the resultant injury and that the petitioner and the United States of America were joint tort feasors (R. 87, 88). However, the Circuit Court of Appeals held that contribution did not exist *in admiralty* in that there was not a common liability (R. 88). The Circuit Court of Appeals held there was jurisdiction under the Public Vessels Act (R. 86), increased the award to the libellant (R. 91), held that his capacity to sue had not been impaired by the acceptance and retention of compensation (R. 89), and that the United States of America was entitled to full indemnity under its "Warshipsteve" contract (R. 89). After the decision of the Circuit Court of Appeals, a Petition for Limited Rehearing was filed by the petitioner herein (R. 92) and the same was denied on January 31, 1946 (R. 103) with a *Per Curiam* opinion (R. 101). A motion to take additional testimony as to the intent of the parties to the indemnity provision in the "Warshipsteve" contract was filed (R. 104) and denied on February 19, 1946 (R. 112).

On March 25, 1946, American Stevedores, Inc., filed its petition for writ of certiorari and the same was granted on May 6, 1946 (R. 113).

Assignment of Errors

1. The Circuit Court of Appeals, Second Circuit, erred in holding that, under the Public Vessels Act, 46 U. S. C. A. § 781, the United States of America consented to be sued for personal injuries.

2. The Circuit Court of Appeals, Second Circuit, erred in holding that a longshoreman, having accepted and retained compensation benefits without an award, has not elected to pursue said remedy exclusively and was not precluded from bringing an action against a third party under 33 U. S. C. A. § 933 (a).

3. The Circuit Court of Appeals, Second Circuit, erred in holding that the United States of America under its "Warshipsteve" contract was entitled to full indemnity from a contracting stevedore where the negligence of each concurred in causing injuries to the stevedore's employee.

4. The Circuit Court of Appeals, Second Circuit, erred in holding that there was no contribution *in admiralty* between a shipowner and a contracting stevedore since the enactment of the United States Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901, *et seq.*

5. The Circuit Court of Appeals, Second Circuit, erred in holding that an Admiralty Court had jurisdiction of the indemnity provision in the "Warshipsteve" contract.

POINT I

Under the Public Vessels Act of 1925, the United States has not consented to be sued for personal injuries or death and this conclusion is borne out by the legislative history of the enactment.

The government in its answer (R. 11) admitted that the U. S. S. "Thomas Stone", the vessel involved, was flying the American flag as a public vessel and commissioned by the United States of America to the United States Navy to be operated by the United States as a public vessel (see Article "Fourth" of amended libel [R. 9] and answer thereto [R. 11] by the government).

The impleading petition in its very first article (R. 13) alleges that the "Thomas Stone" was a public vessel.

Further, the proof is undisputed that she was a Navy transport, with an entire Navy crew (R. 38). Troop accommodations had been provided in the vessel on the second platform (R. 41).

The "Thomas Stone" was "an invasion ship" (R. 79). The loading thereof was in charge of an Army officer (R. 80), referred to as Troop Transport Quartermaster (R. 44).

On the facts adduced upon the trial of this action and upon the pleadings, the "Thomas Stone" was a public vessel. *Bradey* v. *United States*, 151 F. (2d) 742, cert. denied 66 S. Ct. 484, and cases cited in 151 F. (2d) at page 743.

The appellant directs itself to the legislative history of the Public Vessels Act (46 U. S. C. A. § 781).

In 1919 there were introduced in Congress two similar bills, known as S. 3076 and H. R. 7124. They were referred to the Committee on the Judiciary. While they

were in Committee, the Attorney General proposed a substitute bill.

A hearing was held on November 13, 1919 with respect to this latter bill (Hearing of the House Committee on Judiciary, S. 3076 and H. R. 7124, November 13, 1919, 66th Cong., 1st Session). The passage of this substitute bill was urged by steamship operators and owners and not in any respect by persons interested in personal injury claims. The hearing brought out clearly the fact that the proposed legislation under discussion did not embrace personal injury or death claims. At page 43 of the minutes of the hearing, the following is found:

> "Colonel Lee: But why the door should be opened to these shipowners, with all due respect to them, as they are an extremely worthy set, to press their claims in tort against the Government, and not to every other tort sufferer, so to speak, is not clear. If the shipowners are allowed to sue, then everybody else having a tort claim against the government it seems to me, in justice should be allowed the same relief."
>
> "Mr. Husted: I think they should be, but we are simply considering now one class of cases. I think they should be. I think if a man is killed by the negligent act of the Government, he should not be compelled to wait upon Congress for some piece of legislation which will authorize him to go into the courts."

True it is that some Congressmen voiced the desirability of remedial legislation covering personal injuries. The same is found at page 44 of the minutes of the hearing, *supra:*

> "Mr. Igoe: For instance, we have before the Committee, speaking of torts, the proposition of allowing persons who sustain personal injuries by reason, for instance, of the negligent operation of

Government automobiles of the Post Office Department, to bring suit against the Government. Some of us feel that while we are passing laws for the rehabilitation of cripples in industry, we might take care of a few cripples that the Government is responsible for, and I just wondered if there is not a difference between subjecting the Government to tort actions ordinarily and this particular case."

However, such legislation was not being proposed. For as Mr. Husted said, *supra:*

> "I think they should be, but we are simply considering now *one class of cases.*" (Italics supplied.)

It would appear that these bills did not get out of the Committee of the Whole House on the state of the Union to which they had been committed (Union Calendar No. 158), after having been reported with an amendment by the Committee on the Judiciary.

On February 2, 1921 Mr. Husted introduced bill H. R. 15977 in the House of Representatives, 66th Congress, 3rd Session. (60 Cong. Rec. 2478.) The bill provided, in part, as follows:

> "A libel in personam in admiralty may be brought against the United States for damages caused by collision by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1917: * * *"

Bill H. R. 15977 was referred to the Committee on the Judiciary. On Feb. 7, 1921, H. R. 15977 was reported with amendments, not material to the question at hand, and was committed to the Committee of the Whole House on the state of the Union (Union Calendar No. 439).

Report No. 1301, 66th Congress, 3rd Session, Feb. 7, 1921, accompanied this bill. It is noted in said report that proponents of the legislation were vessel operators and owners. The Committee noted the various organizations supporting the proposed legislation and refers to them by name. The Maritime Law Association of the United States submitted a brief relied upon in preparation of Report No. 1301.

At page 1 of H. Report No. 1301, the Committee sets forth the purpose of bill H. R. 15977, as follows:

> "*The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged* as the result of a collision with any Government-owned vessel, without requiring an application to Congress, in each particular instance, for the passage of a special enabling act."
>
> "The bill, in principle, is simply a substitute for the practice, long established, of passing special bills, under which *private owners* have been allowed to submit to our admiralty courts admiralty claims of this character." (Italics supplied.)

As is evident from bill H. R. 15977, the minor purpose of said bill was to provide compensation for towage or salvage.

At page 4 of Report No. 1301, the Committee lists the Special Acts passed for the relief of *vessel owners* since 1900.

That the Committee was concerned solely with collision cases is shown by its development of the history of governmental immunity. At page 6 of said report, the Committee, in referring to an Act of June 24, 1910, authorizing the Secretary of Navy to adjust claims involving not more than $500 stated:

"This latter ($500) is, of course, wholly inadequate since the damages in *collision* cases are usually very large in amount." (Emphasis supplied.)

Report No. 1301 will be searched in vain for any suggestion that the purpose of H. R. 15977 embraced personal injury claims.

H. R. 15977 and H. R. 6256 (the latter being introduced by Mr. Husted on May 16, 1921—61 Cong. Rec. 1492) were not passed.

Instead, Congress on December 28, 1922 passed two statutes, 42 Stat. 1066, C. 16 (34 U. S. C. § 599) and 42 Stat. 1066, C. 17 (31 U. S. C. § 215). The former authorized the Secretary of Navy to settle claims for "damages to private property arising from collisions with naval vessels where amount of claim did not exceed $3,000." The latter permitted each department head to settle property damage claims up to $1,000. For a discussion of these laws, see House Report No. 913, 68th Congress, 1st Session, May 31, 1924, page 9 and 15 thereof.

On February 14, 1924, Mr. Underhill introduced in the House of Representatives, 68th Congress, 1st Session, bill H. R. 6989 (65th Cong. Rec. 2474). This bill was referred to the Committee on Claims (65 Cong. Rec. 2474).

On May 29, 1924, Mr. Underhill introduced in the House of Representatives, bill H. R. 9535 (65 Cong. Rec. 9919). This bill was intended as a substitute for H. R. 6989 and was referred to the Committee on Claims.

Two days thereafter, May 31, 1924, Mr. Edmonds, Chairman of the Committee on Claims, brought in H. Rep. No. 913, May 31, 1924, 68th Cong., 1st Session, which report was to accompany H. R. 9535. It is to be noted that, whereas H. R. 6989 had provided "for damages caused by *collision* by a public vessel," H. R. 9535 provided for suits "for damages *caused* by a public vessel."

H. Report No. 913 contained copies of correspondence between the Chairman of the Committee on Claims and various cabinet members as well as a memorandum of law, submitted by one of the cabinet members. The cabinet members recommended passage of H. R. 6989 (H. R. 9535 not being before them as the same was introduced on May 29, 1924, *supra*).

The legislative intent, as contained in Senate and House Reports, unequivocally indicate the purpose of the bills discussed heretofore. At pages 1 and 2 of H. Report No. 913, the following is stated:

> "H. R. 9535 is a substitute for H. R. 6989.
>
> The chief purpose of this bill is to grant *private owners of vessels and of merchandise* a right of action when their *vessels or goods have been damaged* as the result of a collision with any Government-owned vessel, though engaged in public service, without requiring an application to Congress in each particular instance for the passage of a special enabling act.
>
> The bill, in principle, is simply a substitute for the practice, long established, of passing special bills under which *private owners* have been allowed to submit to our admiralty courts admiralty claims of *this character.*
>
> *Shipowners,* whose vessels have suffered a collision with any Government-owned ship in the public service and who have a cause of action under existing procedure, must apply to Congress for the passage of a special enabling act before suit can be brought in the admiralty courts. This situation naturally causes great delay as well as expense in the collection of claims against the Government, and very frequently works great injustice and sometimes bankruptcy to the *vessel owners.* With the enormous increase of Government-owned ships, both mercantile and war vessels, this delay and expense has become a matter of

serious consideration to our privately owned merchant marine. At the same time the business of Congress is occupied to a greater extent with these private bills, something which under present conditions should be eliminated." (Italics ours.)

At page 3 of said report the Committee stated:

"The special acts passed for the relief of *vessel owners* since 1919 illustrate the difficulty under the present system of securing permission even to institute litigation, without taking into consideration the delay in carrying on the litigation itself.

"During the Sixty-sixth Congress (1919-1921), 10 special acts were passed for the *relief of vessel owners.*

"During the Sixty-seventh Congress (1921-1923), 80 bills were filed with the committee and 27 were enacted into law.

"During the first session of the Sixty-eighth Congress upward of 80 special admiralty bills have been introduced in the House." (Italics ours.)

The evil which H. R. 9535 was designed to eliminate is clearly stated at page 2 of H. Report No. 913:

"Under the law as it now stands, no judicial relief is available to a *shipowner* for damages caused by the negligent navigation of a public vessel of the United States. * * * Nevertheless, the United States, while immune from the action of a private suitor in such cases, may, and does, sue *the vessels of private owners*, has its day in court without the risk of costs being awarded against it, and, when the Government vessel is found to have been at fault, refuses to pay the damages *sustained by the private owner.*" (The *Esparta*, 160 F. 289).

"The injustice of such a system of relief has often been expressly recognized by Congress and by the courts." (Italics ours.)

On May 31, 1924 H. R. 9535 was committed by the Committee on Claims to the Committee of the Whole House on the state of the Union. (Union Calendar No. 367.)

The discussion which took place on the floor of the House clearly shows that H. R. 9535 concerned itself solely with property damage.

The sponsor of the bill, Mr. Underhill, stated (66 Cong. Rec. 2087):

> "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels *whose property has been damaged by collision or other fault* of Government vessels and Government agents." (Italics supplied.)

Apprised, as they were, of the purpose of H. R. 9535, many Congressmen were concerned with personal injury claims, which all appreciated were not covered by the bill. Mr. Upshaw said (66 Cong. Rec. 2087):

> "Quite a number of us are interested in cases of this kind, where lives of people are lost by reason of their being run over by Government trucks, *and things of that kind.* Is it possible to bring in an omnibus bill before this Congress ends that will give to those interested an opportunity to proceed for the settlement of those claims?" (Italics supplied.)

Mr. Underhill then replied (66 Cong. Rec 2087):

> "Well, we must take this idea up a step at a time, the first step, as I have explained, was a small claims bill. The second was a step in which the limit of $1,000 was raised to $3,000 as the amount which the Navy Department could settle for damages by naval vessels. This is the third step, and I am sure, if this passes both branches of Congress—and I have every reason to believe that it will pass the Senate as well

as the House—I shall devote some of my time in the summer vacation to the formulation of a bill which I shall present to Congress at the next session; so that the old idea, abandoned on the continent, that 'the king can do no wrong', will be abandoned here in the United States, and the people of the United States will be able to secure justice from their Government."

That property damage was the only type embraced by this bill is found in the following colloquy between Mr. Underhill and Mr. MacLafferty at page 2088 of 66 Cong. Rec.:

Mr. Mac Lafferty:

"Supposing that I correctly understand this, it is provided that the suits can only be taken into the admiralty court where the blame has been laid on the Government. Is that true?"

Mr. Underhill:

"Not entirely; where a man's *property* is damaged, he can bring a suit." (Italics supplied.)

Mr. Underhill then stated (66 Cong. Rec. 2088):

"This measure is endorsed by every department of the Government, and more particularly by the State Department. The State Department, through Mr. Hughes, urges the passage of this bill on the ground that there is no medium now whereby claims can be adjudicated between our Government and foreign governments, and that results frequently in a large overcharge to the United States Government, due to the fact that the only way they can be settled is through the channels of diplomacy, and our Government, rather than err on the wrong side, is per-

haps too liberal in settling these claims for damages to *foreign vessels.*" (Italics ours.)

At pages 14 and 15 of Report No. 913, *supra*, Secretary Weeks states the *amount* of *property* claims was thereby extended in admiralty, in contrast to the settlement of small claims under the two statutes of December 28, 1922, *supra.*

Further discussion between Messrs. Blanton, LaGuardia, Denison, King and Underhill at page 2089 of 66 Cong. Rec. clearly shows that all were concerned with an alien suing the United States for collision and *property* damages and the possibility of the United States cross-libelling and obtaining security for the payment of any judgment the original libellant might be required to pay if the United States of America were successful in its cross-libel.

The bill passed the House on January 19, 1925 (66 Cong. Rec. 2089).

On January 20, 1925 H. R. 9535 was read to the Senate and referred to its Committee on Claims.

The Senate's attention was directed by Senator Bayard to S. Report No. 941, 68th Congress, 2nd Session, which was a duplicate of H. Report No. 913, *supra.* H. R. 9535 was reported by Mr. Bayard with an amendment (Calendar No. 1009). The amendment concerned itself solely with the retroactive date. The Senate desired 1917 in contrast to the House's 1920. After conference of the Senate and House Committees, it was decided to have the retroactive date 1920.

H. R. 9535 became the Public Vessels Act on March 3, 1925 (66 Cong. Rec. 5530).

It is interesting to note that on May 5, 1924, twenty-four days before the introduction of H. R. 9535 by Mr. Underhill, *supra*, Mr. Mills introduced in the House of Representa-

tives, 68th Congress, 1st Session, H. R. 9075 whose purpose it was, as appears from the caption, to amend the Act of March 9, 1920 (Suits in Admiralty Act). This bill was referred to the Committee on the Judiciary and was under consideration at the same time the Public Vessels Act was being considered. Hearings were held on this bill before the Committee on the Judiciary (Hearings of the House Committee on Judiciary on H. R. 9075, 1st Session, May 21, 1924). Many members of the Admiralty bar appeared at the Hearings and urged its passage. Among them were Judge Hough.

Judge Hough's remarks on the hearings, urging the passage of H. R. 9075, show that H. R. 9075 would amend the Suits in Admiralty Act so that said Act would be made applicable to all vessels, public and merchant. Thereby the United States would have been made liable for personal injuries and death, irrespective of the type of vessel, i. e., merchant or public.

H. R. 9075 never reached the floor of Congress.

In contrast, H. R. 9535, a *property* damage bill, became the Public Vessels Act. As has been indicated, *supra*, H. R. 9535 differed from its predecessor H. R. 6989 only in that there was inserted for "damages *caused by collision* by a public vessel" the words "damages *caused* by a public vessel".

Therefore, the question posed in the instant case is:

> Did Congress, by deleting the phrase, "by collision", when enacting H. R. 9535 as the Public Vessels Act, thereby negative its clear intention, as above indicated, to permit suits only for property damage?

We think this must be answered in the negative.

Surely, by omission of the phrase "by collision" Congress did not mean to include damages for personal injury

or death but envisioned such a state of facts as was subsequently presented to this Court in the case of *Canadian Aviator Ltd.* v. *United States*, 324 U. S. 215. (See page 26 hereof), to the Circuit Court of Appeals, 2nd Circuit, in *Great Lakes Dredge & Dock Co.* v. *Santiago S. S. Co. & U. S.*, 155 F. (2d) 148, to the District Court in *McCormack Sand & Gravel Corporation et al.* v. *United States of America*, unofficially reported in 1938 A. M. C., 1569, and to the District Court in *Martin Marine Transp. Co.* v. *United States*, 66 F. Supp. 673.

The deletion of the phrase "by collision" left unrestricted as to *cause* the damage to "owners of vessels whose *property* has been damaged by collision or other fault of government vessels and government agents". (See statement of Mr. Underhill, sponsor of H. R. 9535; 66 Cong. Rec. 208[illegible] see page 13 hereof.)

It is the position of the petitioner that collision by a public vessel was eliminated as the sole cause for damage but that the nature or quality of damages was still confined to *property* damages, in contradistinction to personal injury damages.

The House and Senate reports, the extracts quoted therefrom, and the colloquys between Congressmen which reflect the very marrow of the Public Vessels Act can only lead a traveler along the road of legislative intent to one road sign—the Public Vessels Act does not embrace personal injury damage. In contrast to the statement of Mr. Justice Rutledge in *Hust* v. *Moore McCormack Lines*, unofficially reported in 66 S. Ct. 1218, 1231, where a different statute was being interpreted, the legislative intent, as gleaned from reports, documents, etc., controls the crucial problem presented in this case.

What Congress intended at a certain time may often be determined by a study of its subsequent conduct. And so, true to his promise to work on a bill covering personal in-

jury claims, discussed *supra*, Mr. Underhill on January 30, 1926 introduced in the House of Representatives, 69th Congress, 1st Session, H. R. 8651 (67 Cong. Rec. 3071). Context of bill found at 67 Cong. Rec. 10029. The bill was "to provide for the settlement of claims against the United States on account of property damage, personal injury, or death." It was referred to the Committee on Claims, whose report (H. Rep. No. 667, 69th Congress, 1st Session) was rendered on March 26, 1926.

The bill was divided into three Titles. As to Title I captioned "Property Damage Claims" the bill provided that claims, not exceeding $5,000 in amount, could be settled by heads of departments; that the District Court should have concurrent jurisdiction with the Court of Claims of claims in excess of $5,000, but not in excess of $10,000.

Section 8 (3) of Title I of H. R. 8651 provided that the provisions covering property damage should not apply to any claim for which liability of the Government was recognized by the Suits in Admiralty Act of March 9, 1920 or the Public Vessels Act of March 3, 1925.

Title II of H. R. 8651 captioned "Personal Injury and Death Claims" conferred authority upon the United States Employees Compensation Commission to award and pay compensation for claims of personal injury and death. Maximum liability of the United States was $5,000 (Sec. 204 [a] [5]) and said coverage was afforded only for claims subsequent to April 6, 1920 (Sec. 201 [d]).

Under Section 212 (a), of Title II, claims covered by the Federal Employees' Compensation Act were excluded from the benefits of the instant bill and Section 212 (b) excluded claims by any member of the military or naval forces in case where relief was provided by other laws.

Title III, captioned "Miscellaneous" is not important to the instant problem.

These exclusions become important as they are a signpost of the types of claims covered by other Acts. Since the Public Vessels Act provided for recovery of property damage, where public vessels were concerned, the proposed legislation excluded all cases of property damage, embraced by the Public Vessels Act of the year before.

Since no mention is made in H. R. 8651 of personal injuries under the Public Vessels Act, it is clearly inferable that no coverage was afforded by the Public Vessels Act for personal injuries.

Significant is Mr. Celler's statement at pages 10031-10032 of 67 Cong. Rec. in the discussion of the proposed legislation:

> "It may, therefore, be too early for me to advocate the proposition that the United States district court should open its doors for the purpose of redressing wrongs involved in negligence and other torts resulting in personal injury or death with no limitation as to the amount of recovery. That is the goal toward which we are inevitably tending."

On February 5, 1926 H. R. 8651 was committed to the Committee of the Whole House on the state of the Union. Through Mr. Underhill's efforts, said bill passed the House.

On December 21, 1925, approximately a month before H. R. 8651 was introduced in the House by Mr. Underhill, Mr. Means introduced in the Senate, bill S. 1912 which was the same in purpose, although not as extensive in scope or draftmanship. (67 Cong. Rec. 1233.) Said bill was referred to the Committee on Claims. S. 1912 was reported with one amendment, not here material. That bill was passed by the Senate on March 15, 1926.

On March 17, 1926, S. 1912 was referred to the House Committee on Claims. On March 26, 1926 it was reported

with amendments and committed to the Committee of the Whole House on the State of the Union. (Union Calendar No. 225.) On June 10, 1926, the House resolved itself into a Committee of the Whole for consideration of Senate bill S. 1912. It proceeded to amend the Senate bill to conform to Mr. Underhill's bill H. R. 8651 (67 Cong. Rec. 111086, 111099 to 11111). As so amended, S. 1912 passed the House. S. 1912, with its amendments, was not repassed and therefore the attempt in 1926 to obtain legislation respecting personal injury and death claims failed.

Significant, though, is the attempt of both branches of Congress, one year after the passage of the Public Vessels Act, to obtain remedial legislation for governmental torts resulting in personal injury and death. In so doing, no indication is given by Congress that any remedy existed for such torts under the Public Vessels Act.

On January 13, 1928, Mr. Underhill, still striving to have legislation enacted covering personal injury claims, introduced in the House of Representatives, 70th Congress, 1st Session, bill H. R. 9285 (69 Cong. Rec. 1468). Copy of this bill appears at 70 Cong. Rec. 4837. Title I of this bill concerned itself with property damage and gave to the District Court jurisdiction of claims in excess of $5,000 but not in excess of $10,000. Section 8 (a)(3) of said bill excepted, from the coverage of the bill, property damage claims arising under the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925.

Title II of said bill is captioned "Personal Injury and Death Claims." Section 202 (a) permits awards up to $7,500. Section 208 (a) of this Title excepts, from the coverage of the bill, claims for which compensation is provided by the Federal Employees' Compensation Act and Section 208 (b) excepts any claim for injury or death incurred in the line of duty by any member of the military or naval forces of the United States where relief is provided by other law.

Title III of said bill is captioned "Miscellaneous" and has no bearing on the instant question.

Here again is evidence by Congress that the Public Vessels Act did not cover personal injury claims as no mention is made in Title II of the coverage of personal injuries by the Public Vessels Act, although specific reference is made to property damage, embraced by the Public Vessels Act, in Title I of bill H. R. 9285.

This bill was referred to the Committee on Claims whose report (H. Rep. No. 286, 70th Cong., 1st Session, Jan. 16, 1928) recommended passage of the bill. On January 16, 1928 H. R. 9285 was committed to the Committee of the Whole House on the state of the Union (Union Calendar No. 61). This bill was debated in the House on January 30, 1928 (69 Cong. Rec. 2184). The following colloquy took place during the course of debate (69 Cong. Rec. 2184):

> "Mr. Underhill: * * * Two important acts were the act of 1922, known as the Underhill small claims act, which gave the departments the power to settle property damage up to $1,000 and the admiralty act of 1925 (Public Vessels Act) which authorizes suits to be brought against the United States in admiralty for damages occasioned by Government-owned vessels.
>
> * * * *
>
> Mr. Montague: Did those cases arise out of contract or tort?
>
> Mr. Underhill: Those cases were for *property* damage." (Italics supplied.)

On February 17, 1928, H. R. 9285 passed the House. In the Senate H. R. 9285 was referred to the Committee on Claims. This Committee brought in S. Rep. No. 1699, 70th Congress, 2nd Session. It was recommended that H. R. 9285 pass with certain amendments, the same being re-

ported by Mr. McMaster. At page 7 of S. Rep. No. 1699 this statement is found:

> "No provision has been made for suit against the United States with respect to personal injury or death claims."

This bill was passed in both the Senate and the House but received a pocket veto by the President (70 Cong. Rec. 5217, 5220, and 5230).

Repeated efforts have been made since H. R. 9285 to enact legislation affording a remedy to personal injury or death claimants. Until 1946, no judicial relief was afforded for personal injury or death claims except by way of the time-honored practice of passing private bills. Thus, it will be observed that on March 15, 1937 bill H. R. 601 (Private No. 9) was approved by Congress. It is captioned *An Act For the Relief of Edna M. Callahan and Anna Scott*, found in 50 Statutes at Large, Part 2, page 927. Another bill to the very same effect and covering the very same accident, although relating to two other persons, was passed and is captioned *An Act For the Relief of Margaret Grace and Alice Shriner*, found in 50 Statutes at Large, Part 2, page 922. House Reports No. 33 and No. 322, 75th Congress, 1st Session, cover these Acts. By this legislation Congress awarded various sums out of any money in the Treasury, not otherwise appropriated, for injuries sustained by the claimants through the negligence of the United States which caused an explosion on a Navy vessel plying between the Fifth Street Landing at San Pedro, California, and the United States ship "Relief" lying in San Pedro Harbor.

Beyond dispute, this naval vessel was a public vessel. Further, if another remedy, other than by private bill, were available to these claimants, the Committee on Claims would have been precluded by its own Rule 15 from consideration of these claims. Rule 15 of the Rules of the

House Committee on Claims, existent for many years, provides:

> "Rule 15 precludes consideration of any claim over which another tribunal, court, or department has jurisdiction, while such jurisdiction is not exhausted. In the settlement of claims, Congress is always the place of last resort. If other resort or manner of obtaining redress against the Government has been provided (as in the jurisdiction of the Court of Claims, the revenue laws, and bond redemption statutes, for example), it obviously was provided by the Congress, and the committee will insist that such jurisdiction be exhausted. A failure by claimant to furnish the proof required by the court or department for determination of his claim is not exhausting the remedy provided, and the committee will not recognize such cases. In the great majority of claims entertained by the committee, however, no other source of redress has ever existed."

It will, therefore, be seen that by its very own construction of its own legislation Congress and its Committees realized that the Public Vessels Act did not give a remedy for personal injury or death. If said Act had provided a remedy, the Committee on Claims would not have awarded damage to Edna M. Callahan, Anna Scott, Margaret Grace and Alice Shriner.

Porello, in his brief in opposition to the appellant's petition to this Court, attempted to analyze, at page 4 of his brief, the Special Acts which have been discussed, *supra*. He characterized the aforementioned Acts, as referring to accidents ashore, compensation claims and appropriations by Congress where claims were settled without a law suit.

On the face of the Special Acts it will be seen that these accidents did not occur ashore, but on the contrary occurred on the naval launch in question. These injuries were third party injuries and were not compensation claims.

In amplification of the point that these claims were paid by appropriations of Congress in order to avoid the necessity of a lawsuit, Porello assumed that the answer to the question in issue was that a suit was authorized by the Public Vessels Act. He sets forth no authority that litigation was permitted. He further sets forth no authority that any administrative agency was authorized to settle such claims. Indeed, no authorization for the settlement of such claims by any administrative agency was possible at that time.

For, it was not until July 3, 1943, that the President of the United States approved a bill which authorized the Secretary of War to adjust claims for property damage, personal injury, or death, caused by military personnel, or otherwise, incident to the non-combat activities of the War Department or of the Army (89 Cong. Rec. 7160). Said Act became § 223b of Title 31, U. S. Code.

Even as to this Act of July 3, 1943, the authority of the Secretary of War to adjust claims for property damage, personal injury, or death, was limited to the amount of $500 or, in time of war, to the amount of $1000.

On December 28, 1945, the President of the United States approved a bill which gave to the Secretary of Navy the same authority as that conferred upon the Secretary of War in 1943. The Act of December 28, 1945 became § 223 d of Title 31, U. S. Code.

The movement in Congress to afford a remedy for personal injury claims or death claims, still went on apace.

Thus, we find on August 2, 1946, the President of the United States signing bill S. 2177 (92 Cong. Rec. A5251—unbound advance sheet for August 12, 1946*).

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* Reference is here made to pages of unbound advance sheets which we understand do not always coincide with pages of bound volumes, when the same are issued.

Title IV of said act is captioned "Federal Tort Claims Act". § 421 of Part 4 of said Act excepts, from the coverage of said Act, claims arising under certain statutes or conditions. Subdivision d of said section exempts claims for which a remedy is provided by the Suits in Admiralty Act or the Public Vessels Act.

The discussion in the Congress, with respect to the Federal Tort Claims Act, is not helpful to a determination of the instant question.

Therefore, there still is left open for determination the question as to whether the Public Vessels Act embraced within its confines claims for personal injury damage or death.

On the basis of the legislative history and Congressional intent, as exhibited throughout the 27 years from 1919 until 1946, it is respectfully submitted that by the Public Vessels Act the United States has not consented to be sued for a claim for personal injury damage or for death.

There has been no decided case which has expressly held that the Public Vessels Act gives a remedy against the United States for claims on account of personal injury or death.

In *O'Neil* v. *United States*, 11 F. (2d) 869, aff'd 11 F. (2d) 871, Judge Campbell, although stating the purpose of the Act (p. 870), decided the case on the theory that an employee of the United States was not given any rights under this statute against the United States, his employer. This theory compelled the Circuit Court of Appeals, 2nd. Circuit, to conclude that a naval officer could not recover for the unseaworthiness of a submarine in *Dobson* v. *United States*, 27 F. (2d) 807, cert. denied 278 U. S. 653, No. 556. The question raised in the instant case was left open in the *Dobson* case, as appears from the statement at page 808 of said case:

"Appellee, on the other hand, argues that the statute should be construed as limiting recovery to dam-

ages to property and not contemplating compensation for loss of life. We do not find it necessary to determine this question in the present case."

It is clear that in the *Dobson* case, *supra*, the Circuit Court of Appeals for the Second Circuit, left open the question as to whether the Public Vessels Act provided a remedy for property damage only.

The question raised by this appeal was not before the Court in *Bradey* v. *United States*, 151 F. (2d) 742, cert. denied 66 S. Ct. 484, wherein it was held, following the *Dobson* case, *supra*, that a fireman on a destroyer had no remedy against the United States under the Public Vessels Act but was relegated to pension rights under other laws.

In *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, this Court traced the legislative history of the statute here involved and settled the controversy as to whether the phrase "damages *caused* by a public vessel" meant "damages caused by *collision*" only. This Court there did not consider whether the term "damage" meant "property damage" solely or embraced personal injury damage. The following statement, appearing at page 218 of 324 U. S. shows that this Court had in mind that the Public Vessels Act was a bill for the relief of shipowners:

> "The Public Vessels Act, 1925, was the last in a series of statutes directed generally at affording private *vessel owners* an adequate and efficient remedy for damages arising from negligent operation of ships owned by the United States." (Italics supplied.)

Although this Court did not have before it in the *Canadian Aviator* case the question now presented, the opinion contained certain statements which are enlightening.

This Court said the following (324 U. S. 223):

> "In 1924, H.R. 6989 was introduced in the House of Representatives, its provisions being similar to

those of the Public Vessels Act as adopted, with this material difference: Section 1 of that bill authorized suit against the United States 'for damages caused *by collision* by a public vessel.' (Italics added) On reference to the House Committee on Claims, a substitute bill, H.R. 9535, was reported to the House. This bill provided for suits 'for damages caused by a public vessel of the United States.' This bill with the latter phrase included subsequently became the Public Vessels Act. This change in the language of the Act prior to its adoption convinces us that Congress intended to authorize suits in other than collision cases. The sponsors of the bill in both houses of Congress understood that it extended to cases where damage was done 'by collision, or other fault of Government vessels and Government agents'.* Moreover, Congressional reports on this bill and the course of discussion in the numerous hearings held on predecessor measures to the present bill, indicates that authority to sue was not to be limited to cases where the vessel was the physical instrument that caused the physical damage."

Thus used, Mr. Underhill's statement to the House of Representatives indicated that the damages for which Congress had consented to be sued were those caused not only "by collision" but also by "other fault of Government vessels and Government agents".

It must not be overlooked however that Mr. Underhill's statement shows that the only damages, for which the

* 66 Cong. Rec. 2087. Representative Underhill, the sponsor of the bill, stated:

"The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents."

Public Vessels Act was intended to be a remedy, were damages to "owners of vessels whose property has been damaged".

In the course of its opinion this Court, in the cited case, made statements which must be considered in the light of the factual situation then under review. They are as follows:

At page 224 of 324 U. S.:

> "The consent to suit embodied in the Act thus extends to cases where the negligence of the personnel of a public vessel in the operation of the vessel causes damage to *other* ships, their cargoes, and personnel, regardless of physical contact between the two ships, and where principles of admiralty law imposed liability on private parties. There seems no logical reason for allowing recovery for collision and refusing recovery for damages caused by other movements of the offending vessel". (Italics supplied.)

. . . . . .

And at page 228 of 324 U. S.:

> "Since we hold that the Public Vessels Act was intended to impose on the United States the same liability (apart from seizure or arrest under a libel in rem) as is imposed by the admiralty law on the private shipowner, it remains to be considered whether petitioner states a valid cause of action under general principles of admiralty law, in rem and in personam."

At first blush, these might appear to be statements that the Public Vessels Act permits suits for personal injuries.

We are sure that such a conclusion does not necessarily follow. The reason for this is obvious. The *Canadian Aviator* decision involved only property (hull) damage to the "Cavelier" resulting from her grounding, while fol-

lowing a naval patrol boat which was piloting the steamer in Delaware Bay.

Under the rule of law requiring strict construction of statutes waiving sovereign immunity (*United States* v. *Sherwood*, 312 U. S. 584; *Eastern Transportation Company* v. *United States*, 272 U. S. 675) and under the legislative history, *supra*, there is no jurisdiction of a cause of action for personal injuries under the Public Vessels Act.

POINT II

A longshoreman, having accepted and retained compensation benefits without an award, has thereby elected to exclusively pursue his rights under the U. S. Longshoremen's and Harbor Workers' Compensation Act and such was the intent of Congress.

If this Court decides that there is jurisdiction under the Public Vessels Act, 46 U. S. C. A., §781, for a personal injury claimant to sue the United States of America, the question which next presents itself is the capacity of Rosario Porello, the injured longshoreman, to institute the suit at bar.

On the other hand, should this Court determine that there is no jurisdiction under the Public Vessels Act for the institution of the suit against the Government, it may bypass any determination on the remaining questions raised by the petitioner here.

Therefore, it may be entirely consonant for this Court to leave unresolved the remaining questions presented on this appeal. However that may be, the *desideratum* oft-expressed by this Court, that there be uniformity of decision in the Maritime Law (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438), invites the attention and consideration of this Court.

As has been stated heretofore, p. 3 hereof, Porello received compensation benefits and medical attention aggre-

gating $1,421.77 under the Longshoremen's Act (R. 70, 80). In fact, Porello received compensation for four months after the institution of his suit and retained the same (R. 76, 77).

It is petitioner's position that by the acceptance and retention of said compensation payments, Porello evidenced his election, upon the receipt of the first compensation payment on October 5, 1942, to accept compensation under Section 33(a) of the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 933a) and that he ratified and confirmed his election made on October 5, 1942, by accepting and retaining the payments covering the four month period after the institution of this suit.

By reason thereof, the Court had no jurisdiction to grant any recovery herein to him. Such defense was pleaded in petitioner's answer (R. 16, 17). It is not contended by the petitioner that under Section 933b of 33 U. S. C. A. that there was an assignment of Porello's cause of action against the United States to a third person, but that under Section 933a, the receipt of such compensation payments by Porello constituted an irrevocable election of his right to take compensation, which right is exclusive of all other rights or remedies (33 U. S. C. A. § 905).

It is the petitioner's contention that if a longshoreman's cause of action against a third party, after he has accepted compensation without an award, be suspended in mid-air or be within the "twilight zone" of the law, the cure-all is to come from the Congress. For judicial tribunals to embark and continue on a course of conduct, as they have done, is to recognize that they are indulging in "judicial legislation". This was appreciated by the Circuit Court of Appeals, 2nd Circuit in *Toomey* v. *Waterman S. S. Corp.* 123 F. (2d) 718, 721, where it said:

> "It may be that it is more just to allow an employee to resort to both remedies than to have ac-

ceptance of compensation either with or without an award, operate to divest his cause of action. *That, however, was a consideration for the law-making body.* In any event the chance for constant differences over an employee's understanding of his legal rights which is involved in the interpretation of the act sought by the plaintiff is far from desirable. *It would seem better that an employee who has accepted compensation should either lose his individual right to sue third parties or should retain both rights.* If he knows he is getting compensation, as he plainly did here, that in our opinion was enough." (Italics supplied.)

The Federal statute was modeled upon the New York State Workmen's Compensation Law as it existed in 1927. *Hunt* v. *Bank Line*, 35 F. (2d) 136 (C. C. A. 4); *The Employers' Liability Assurance Corporation Ltd.* v. *Monahan*, 91 F. (2d) 130 (C. C. A. 1). However, in 1937, subdivision (1) of Sec. 29 of the New York State Workmen's Compensation Act was amended so as to provide that an injured employee "need not elect whether to take compensation under this chapter or to pursue his remedy against such other but may take such compensation and * * * pursue his remedy against such other subject to the provisions of this section." The very next year, 1938, the Congress amended only subdivision (b) of § 933 of 33 U. S. C. A. so that an *assignment* of the cause of action against the third person was effected ~~only~~ where an award was made. Subdivision (a) of § 933 was left intact. The purpose of this amendment of subdivision (b) of section 933 is gleaned from Report No. 1945 of the House of Representatives, 75th Congress, 3rd Session, dated March 14, 1938.

At page 9 of said report the purpose of the amendment is stated and concludes as follows:

"This amendment follows the New York workmen's compensation law, which contains a provision that the

'awarding' of compensation shall operate as an assignment of the cause of action."

It is patent that no reference is made to the 1937 amendment, *ante*, of the N. Y. State Workmen's Compensation Act. Surely, if Congress had intended, by its 1938 amendment of subdivision (b) of § 933 of 33 U. S. C. A., to give the injured employee the right to simultaneously take compensation and also to sue a third party wrongdoer, it would have and could have so provided in conformity with the previous year's amendment of the New York State Workmen's Compensation Law. Is it not significant that the House of Representatives in the foregoing report only referred to the fact that it "follows the New York Workmen's Compensation Law, which contains a provision that the 'awarding' of compensation shall operate as an assignment of the cause of action"? *Sequitur* that the provision for election under subdivision (a) exists separate and apart from the question of assignment under subdivision (b). In this connection, the statement of the Supreme Court of New Jersey in *Ross* v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported), is apposite (at pp. 734-735 of 1943 American Maritime Cases):

> "The subsequent amendment of subsection (b) of sec. 933 does not limit the scope or effect of the foregoing pronouncement. The only effect of the amendment was to postpone the transfer of the title to the cause of action against a third party until there has been an actual award of compensation under the Act. *The requirement for an election under subsection (a) was not changed by the amendment, nor deferred until such time as an actual award of compensation has been made. To hold otherwise would be, in effect, judicial legislation, and frustrate the evident intent of sec. 933 as a whole,* by permitting an injured employee to follow two remedies with the possibility of

a double recovery in the event that the employer is content not to apply for an award." (Italics supplied.)

The Court in the *Ross* decision, *supra,* answered the contention that the third party, shipowner, may not avail itself of the situation by saying (p. 736):

"* * * The defendant may avail himself of this as a defense, not because he has been or will be prejudiced by such conduct, *but because the plaintiff has relinquished the right to pursue his common law remedy against the defendant in order to avail himself of the remedy set up by the statute,* thus effecting a legal waiver, i. e. the voluntary relinquishment of a known right." (Italics supplied.)

The Circuit Court in the instant case did not give careful consideration to this all-important question of *election of remedy* under the Longshore Act. The foregoing statement is buttressed by the fact that as authority for its holding that an injured longshoreman's capacity to sue is not impaired by his acceptance and retention of compensation, it cited the *Ross* case, *supra.* The holding in the *Ross* case stands opposed to the result in the case at bar.

This is indeed the very first case that has been presented to any Circuit Court of Appeals squarely on the question of *election.* The same Circuit Court on April 9, 1945 had before it *Grasso* v. *Lorentzen,* 149 F. (2d) 127, cert. denied 66 S. Ct. 57. A reading of that case will show unqualifiedly that the pleadings and decision concerned themselves with the *assignment* question under subdivision (b) of § 933.

The question of election has been before the District Courts on many occasions and a heterogeneity of decision has resulted. Holding that there is no impairment

to sue a third party upon the acceptance and retention of compensation without an award, are:

Iaria v. *Silver Line*, 56 F. Supp. 42;
Cupo v. *Isthmian S. S. Co.*, 56 F. Supp. 45;
Brusich v. *Grace Line*, 56 F. Supp. 48;
Sessa v. *Weeks Stevedoring Co.*, 56 F. Supp. 50;
Grasso v. *Lorentzen*, 56 F. Supp. 51, aff'd 149 F. (2d) 127 (distinction noted, *supra*);
Tartaglio v. *Cunard White Star Line*, 56 F. Supp. 55.

Contra:

Ross v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported);
Bellantuono v. *American Export Lines, Inc.*, 1944 American Maritime Cases 437 (not officially reported).

In *Bellantuono* v. *American Export Lines, Inc.*, *supra*, the District Court followed the yardstick enunciated by the Circuit Court of Appeals, 2nd Circuit, in *Toomey* v. *Waterman S. S. Corporation*, 123 F. (2d) 718, that a "conscious exercise" of an election to take compensation precludes a third party action.

The New York Court of Appeals in *Riociardi* v. *American Export Lines*, 294 N. Y. 812, affirming 268 App. Div. 606, has recently answered two questions certified by the Appellate Division, Supreme Court, 2nd Department. By its answers, the New York State Courts now follow those decisions of the District Courts which allow the prosecution of a third party action, after acceptance and retention of compensation without an award. In so doing, they are following the well established principle that federal court interpretation of a federal Act are imperative authorities for a state court. By so doing, they are following a trail of confusion as the District Courts are in disagreement with one another.

A stevedoring firm makes no voluntary payments to its injured longshoremen. The characterization of such payments as voluntary, as has been indulged by the Circuit Court of Appeals, misconceives or overlooks the compulsion under which a stevedore pays compensation. *33 U. S. C. A. § 914 (a)*. A stevedore cannot with impunity controvert a longshoreman's claim for compensation. Yet, it better had controvert every claim, for as the situation stands today, it steers its course in a maritime industry, sitting in a cockpit of confusion. Only by controverting every claim, with a possible resultant penalty therefor, can a stevedore or its compensation carrier be certain that an award will be made, which would work an assignment of a longshoreman's right against a third party, and that under that award its maximum liability will be $7,500, as provided by *§ 914 (m) of 33 U. S. C. A.*

The hardship and inequality of the protection to a stevedore under the Longshore Act is shown by the following typical case. The longshoreman, having accepted compensation without an award, sues the shipowner in negligence and the shipowner impleads the stevedore under the contract of indemnity, *supra*. The compensation carrier or liability underwriter then returns the defense of the suit to the stevedore on the grounds that the stevedore may be held liable by virtue of its assumption by contract of the indemnification of the shipowner for the latter's negligence, as found by the Circuit Court in the instant case. Coverage is not afforded for assumed obligations. Recovery is then had by the longshoreman, whose capacity to sue has been held to be unimpaired, and the shipowner, on its contract of indemnity, despite his own negligence, recovers fully from the stevedore, who can look to no one for recoupment. The maximum liability of $7,500 under the Longshore Act fades into nothingness for oftentimes the recovery is very substantial. Certainly the result to the stevedore is harsh and anomalous.

POINT III

A contracting stevedore is not an indemnitor or insurer of a shipowner's negligence, absent unequivocal or clear language to that effect in the stevedoring contract.

American Stevedores, Inc. was impleaded pursuant to a "Warshipsteve" contract, the so-called indemnity provision of which reads as follows (R. 14):

> "The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants".

It will be noted that the words "indemnify" or "hold harmless", etc., are absent from the quoted clause of this "Warshipsteve" contract.

The law on the subject of the responsibility of contracting stevedore to shipowner under a stevedoring contract has hitherto been enunciated by the Circuit Court of Appeals for the 9th Circuit in *United States* v. *Wallace*, 18 F. (2d) 20, and by the Circuit Court of Appeals for the 1st Circuit in *Weldon* v. *United States*, 65 F. (2d) 748. In concluding that the provision for indemnity in the "Warshipsteve" contract in the case at bar entitled the United States, shipowner, to full indemnity, the Circuit Court of Appeals reiterated the rationale of the *Wallace* case, *supra*, yet arrived at a diametrically opposed result. This, despite the rule of thumb in the *Wallace* case (18 F. (2d) 21):

> "As is pointed out in Perry v. Payne, *supra, we should not, in the absence of language free from all*

doubt, conclude that the parties intended the contractor should assume an obligation which, for a single act of negligence on the part of the owner, or of one of its employees, over whom the contractor had no restraint or control, would not only wipe out all profit, but would exceed the total consideration for the job." (Italics supplied.)

The result of the *Wallace* case becomes indeed salient by virtue of the fact that the Court there was interpreting a United States Shipping Board contract, which incorporated an indemnity clause similar to the instant one, and in the cited case the United States, shipowner, was held solely at fault.

In *Weldon* v. *United States*, 65 F. (2d) 748, the Circuit Court of Appeals, 1st Circuit, was confronted with the construction and interpretation of a United States Shipping Board Merchant Fleet Corporation contract, which contained a *similar indemnity clause* (p. 749 of 65 F. (2d) middle of right hand column—Compare indemnity clause in instant matter at pp. 14 and 66 of Record). In construing this contract, the Court in the cited case said (65 F. (2d) at p. 749):

"It would be *extraordinary* to impose upon a stevedore liability for the negligence of a shipowner with respect to permanent structures on the ship, over which the stevedore has no duty of maintenance and no control whatever. * * * The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising out of its work. *If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structures, it cannot be doubted that the contract would have said so.*" (Italics supplied.)

Yet the very judicial result which would be extraordinary to the Circuit Court of Appeals, 1st Circuit, becomes the reasonable pattern of interpretation for the Circuit Court of Appeals, 2nd Circuit. This irreconcilable conflict becomes the warp and woof of this appeal.

In refuting the argument of the petitioner that this "Warshipsteve" contract should be interpreted so that complete indemnity could only be had if the contracting stevedore were solely negligent, the Circuit Court said (R. 88):

> "The stevedore's agreement to carry compensation insurance forbids that construction, because, having insured, it would not be liable to the person injured."

The same is palpably erroneous in that the person injured might very well not be the stevedore's employee in which event the stevedore might, under the facts, be liable for its negligence. Cogency for this argument is found in the very wording of *General Admiralty Rule 56* which reads in part as follows:

> "* * * Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; * * *."

If the injured person were not the employee of the assured, and if the stevedore were found negligent, then the decree *in admiralty* would run directly against the stevedore.

Various Circuit Courts and other tribunals have characterized the terms or language of a contract which warrant the judicial interpretation that a contractor or indemnitor will indemnify another contractor for the latter's negligence.

To accomplish that result the Circuit Court of Appeals, 7th Circuit, in *North American Ry. Const. Co. v. Cincin-*

nati Traction Co., 172 F. 214, said *clear* language must be utilized. The Circuit Court of Appeals, 5th Circuit, in *Southern Bell Telephone & Telegraph Co.* v. *Mayor and Board of Aldermen*, 74 F. (2d) 983, said such a result required *unequivocal* terms. The Circuit Court of Appeals, 4th Circuit, in *Washington & Berkeley Bridge Co.* v. *Pennsylvania Steel Co.*, 215 F. 32, 34, said:

> "The presumption is exceedingly strong against an undertaking by any one except an indemnity company to be responsible for the negligent acts of another."

In *United States* v. *Wallace et al.*, *supra*, the Circuit Court of Appeals, 9th Circuit, said (18 F. (2d) at p. 21):

> "* * * it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in *clear and unequivocal* terms." (Italics supplied.)

The rule governing the construction of contracts in New York State has been expressed by its Court of Appeals in *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 41, as follows:

> "It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in *unequivocal* terms." (Italics supplied.)

To same effect, 31 *Corpus Juris*, page 431.

The construction of the Circuit Court here has, at present writing, already permeated many pending cases resulting in the defense of various actions having been returned to the various assureds by their P. & I. underwriters on the ground that an assured is not covered for liabilities assumed by contract.

If it were the intention of a contracting stevedore to indemnify a shipowner for the latter's negligence, either sole

or concurrent with that of the stevedore, the "Warshipsteve" contract would have provided, as the contract did in *Kogusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co. Inc.*, 23 F. Supp. 403, aff'd 100 F. (2d) 1016 (C. C. A. 2), that indemnity was to be had for damages "for which either or both of the parties hereto may or shall be liable."

This "Warshipsteve" contract between the petitioner herein and the Government is to be accorded no bizarre interpretation merely because the United States is a contracting party (R. 65). This Court, as recently as March 25, 1946, in *S. R. A. Inc.* v. *State of Minnesota*, 66 S. Ct. 749 said (p. 754):

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court. United States v. Allegheny County, supra, 322 U. S. at page 183, 64 S. Ct. at page 914, 88 L. Ed. 1209. * * * *Normally, contracts between the United States and others are construed as contracts between private parties.* Lynch v. United States, 292 U. S. 571, 579, 54 S. Ct. 840, 843, 78 L. Ed. 1434." (Italics supplied.)

It is respectfully urged by the petitioner that this "Warshipsteve" contract commands "normal" construction. The words used in the contract and the construction thereof are usual.

The opinion of the District Court (R. 68), the findings of fact (R. 70) and conclusions of law (R. 71), made by that tribunal, are entirely silent as to this so-called contract of indemnity. In fact, the record will be searched in vain to find any suggestion that the United States contended in the District Court that it was entitled to be indemnified *wholly* where its negligence concurred with that of the petitioner herein.

In fact, resorting to the plain intendment of the impleading petition of the United States of America, it will be observed that the "Second" paragraph of said impleading petition (R. 14) alleges that the libelant's injuries were due "*solely* to the negligence, if any negligence be established, of American Stevedores, Inc.," by reason of which the United States of America under the provision in the "Warshipsteye" contract was entitled to indemnity.

The first time that the contract assumed any stature or proportion on the proposition of *full* indemnity was its appearance in the assignments of error filed by the government (R. 73). It is interesting to note the relative importance of that question by its position as No. 20, the very last assigned error (R. 74).

When the Circuit Court of Appeals construed the contract as it did, American Stevedores Inc. petitioned the Circuit Court of Appeals for a limited rehearing (R. 92), confined to the interpretation placed by the Circuit Court of Appeals upon this contract. There was cited to the Court (R. 96) its own decision in *Shamrock Towing Co.* v. *City of New York*, 16 F. (2d) 199.

In the *Per Curiam* opinion denying the aforementioned petition for limited rehearing (R. 101), the Circuit Court of Appeals, in attempting to distinguish the instant contractual interpretation from its interpretation in the *Shamrock* case, *supra*, rested its distinction on the theory that a charterer may be liable to an owner without any fault. "A charterer is only cast in damages for its negligence and a presumption of negligence exists where the scow, bailed in good condition, is returned in a damaged state. *C. F. Harms Co.* v. *Turner Const. Co.*, 3 F. (2d) 591 (C. C. A. 2). In the *Shamrock* case, the impleaded respondent (the case being in admiralty) was only held liable for half-damages by the Circuit Court of Appeals since the respondent was held liable for its share of negligence, despite the indemnity clause there (Quoted at R. 96), which is similar in scope to the instant one.

The attempted distinction by the Circuit Court of Appeals is a distinction without a difference. By judicial emasculation the Circuit Court of Appeals has injected uncertainty and discord into maritime matters, where formerly uniformity existed.

As stated in the petition for limited rehearing to the Circuit Court of Appeals (R. 99), American Stevedores Inc. moved that Court on February 4, 1946 for leave of court to take proof for submission to that Court as to the intent of the parties to the "Warshipsteve" contract (R. 104).

Annexed to the notice of motion were the affidavits of the Chairman of the Stevedoring Committee of the Maritime Association of the Port of New York (R. 107) and of the Vice-President and Operating Manager of American Stevedores Inc. (R. 105). Unequivocally, these gentlemen state that, at the time the "Warshipsteve" contract was drafted covering the Port of New York, it never was the intention of any stevedore, including American Stevedores Inc., to indemnify the United States for its own negligence but that indemnity was only provided for the stevedores' own negligence. Where the negligence of each concurred in producing harm, it was the intention that each would be responsible for their respective negligence (R. 105, 108).

It is to be noted that no opposing affidavits were submitted by the United States of America. To the mind of the petitioner herein, the reason is patent—the result, arrived at by the Circuit Court of Appeals was never intended by the contracting parties to the "Warshipsteve" contract.

Silence of the United States of America on this proposition constitutes an acquiescense in the stated intentions of the parties to this "Warshipsteve" contract.

In determining the scope or meaning of this contract, the interpretation placed upon it by the parties themselves is entitled to great, if not controlling, influence. *Old Colony Trust Co.* v. *City of Omaha*, 230 U. S. 100, 33 S. Ct. 967.

It is respectfully submitted that the interpretation placed upon this contract by the Circuit Court of Appeals, Second Circuit, is erroneous.

POINT IV

The U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901 *et seq.*) has not changed the rule of contribution between joint tort feasors in admiralty.

We have discussed, *supra*, the "Warshipsteve" contract and the interpretation placed upon same by the Circuit Court of Appeals, 2nd Circuit, in the case at bar. In order to reach the question of the interpretation of the "Warshipsteve" contract in logical sequence, the Circuit Court of Appeals considered firstly the question of jurisdiction under the Public Vessels Act (R. 86) and the question of proximate cause (R. 87). It decided that jurisdiction lay under said statute and that the United States of America and American Stevedores, Inc., were joint tort feasors since the negligence of each "operated concurrently in producing the result" (R. 88).

Proceeding upon such a finding of joint wrongdoing, the Circuit Court of Appeals then held that contribution between these joint tort feasors did not lie, since a common liability on the part of the United States of America and American Stevedores, Inc. did not exist (R. 88). That conclusion stemmed from the fact that compensation was the exclusive remedy of the libellant as respects American Stevedores, Inc.

Having held that contribution did not lie, the Court then proceeded to the interpretation of the "Warshipsteve" contract (R. 88). In its *Per Curiam* opinion denying limited rehearing (R. 101), the Circuit Court of Appeals stated that the point of contribution may be considered left open since determination of the contribution question was not

essential to decision in view of the indemnity provided by the "Warshipsteve" contract.

This petitioner has traced the rationalization of the Circuit Court of Appeals on the question of contribution for the petitioner feels that that question must be resolved, since the "Warshipsteve" contract did not and was never intended to indemnify the United States for its negligence, where said negligence concurred with that of the stevedore.

It is a fundamental tenet of admiralty that "the right to contribution belongs to the substantive law of admiralty. It is not a mere incident of a form of procedure." Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.*, 218 U. S. 264, 31 S. Ct. 17. The right to contribution is a consequence of the joint tort. *Benedict on Admiralty* (6th Ed.), Vol. 2, § 353, page 553.

As late as October 1945 (3 months before the decision in the instant case), the Circuit Court of Appeals, 2nd Circuit, per Circuit Judge Learned Hand, had before it in *Barbarino* v. *Stanhope S. S. Co.*, 151 F. (2d) 553, the question as to whether an impleading petition in admiralty should have been dismissed by the trial court where the parties were identically situated, to wit, injured longshoremen suing the shipowner who had impleaded the contracting stevedore, employer of the injured longshoreman. In the cited case the court appreciated that the shipowner had a very real interest to hold in the stevedore impleaded in order to obtain contribution. The Court there said (151 F. (2d) 555):

> "* * * Whether that would be enough interest to support an appeal we need not decide, *because the suit is in the admiralty where contribution between joint tort feasors has existed since 1875.* The Alabama, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable." (Italics supplied.)

In holding in the case at bar that contribution does not lie *in admiralty* between shipowner and contracting stevedore as joint tort feasors, the Circuit Court virtually lifted by its bootstraps a concept of contribution from another field of jurisprudence and infused it into the maritime law. In so doing, reliance was placed upon *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631 and *Walker-Kroger Grocery & Baking Co.*, 214 Wisc. 519, which were actions *at law* involving automobiles in which local statutes were construed. Premising its conclusion upon the fact that a statutory immunity existed in favor of a contracting stevedore from suit by an injured employee under the Longshore Act, the Court has violated the *ratio decidendi* of this Court in such cases as *The Chattahoochee*, 173 U. S. 540 and *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394.

Remedially, an injured longshoreman is relegated to compensation as against his employer. Nevertheless, the right to contribution between joint tort feasor *in admiralty* does not depend upon a common remedy *to the party injured.* "'t (contribution) is dependent upon the admiralty doctrine that *the burden of injuries resulting from common fault shall be equally borne by those responsible.*" Judge Thomas Thacher in *Davis* v. *Molyneaux*, 7 F. (2d) 172, 173. Thus, it will be seen that under the Harter Act, 46 U. S. C. A. §§ 190 *et seq.*, the carrying vessel is immune by statute for damage to its cargo due to errors of navigation. Yet, the non-carrying vessel, found mutually at fault with the carrying vessel, recovers from the carrying vessel one-half of the damages, paid or to be paid to the carrying vessel's cargo, although the carrying vessel could not be liable to the cargo owner. *The Chattahoochee, supra; Aktieselskabet Cuzco* v. *The Sucarseco, supra.*

Analogies respecting contribution attempted to be drawn from sources other than admiralty are without persuasive force. With due deference to the Circuit Court, it is re-

spectfully submitted that the rationale of *The Tampico*, 45 F. Supp. 174 and *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, properly enunciates the law between shipowner and contracting stevedore since the enactment of the Longshore Act.

As was said in *The Tampico*, 45 F. Supp. 174, 175, where the shipowner, Hedger, who had been sued *in admiralty* by the injured longshoreman, impleaded the stevedore, Nicholson, from whom it sought contribution:

> "The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. The Hamilton, 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; The Atlas, 93 U. S. 302, 23 L. Ed. 863. *Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force.* 'The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. (citation) Whatever its origin, the admiralty rule in this country is well known to be the other way.' (citations) • • •". Erie R. R. Co. v. Erie Transportation Co., 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450."
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> *"The immunity given Nicholson (stevedore) by the statute from suits arising out of libellant's (longshoreman's) injuries furnishes no defense against Hedger's (shipowner's) claim to contribution as between joint tort-feasors."* (Italics supplied.)

In *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, appeal dismissed 110 F. (2d) 234, a shipowner in an independent admiralty action sought indemnity or contribution from,

the contracting stevedore for payments made to respondent's employee. The Court there said (p. 305 of 26 F. Supp.):

> "If the longshoreman's right of action against the vessel was not taken away by the Act he can libel the vessel as before, *and an owner of the vessel who is obliged to pay damages has the same rights and remedies against other persons as he had before the Act was passed.*" (Italics supplied.)

The District Court and the Circuit Court of Appeals, 2nd Circuit, have bypassed completely any discussion of active and passive negligence, primary and secondary liability. The finding that the negligence of the respondent and respondent-impleaded operated concurrently to produce the result militates, to the mind of the petitioner herein, against any consideration of active and passive negligence.

Whether the finding that the United States of America and American Stevedores Inc. were joint tort feasors connotes a joint operation or common degree of fault, *in pari delicto*, is unimportant. This action, being in admiralty, is governed by the maritime substantive concept of division of damages in contradistinction to the Continental rule of comparative negligence. Many writers have rebelled against this concept, steeped in American maritime law, and yet have recognized its existence and application. See *Robinson on Admiralty*, 1939, pages 853-864; Swan, J., in *Luckenbach Steamship Company Inc.* v. *United States of America*, unofficially reported in 1946 A. M. C. 1120, 1123; Clark, J., in dissenting opinion in *Harbor Oil Transport Co.* v. *The Plattsburgh Socony*, 151 F. (2d) 708.

For a full and comprehensive study of the right to divided damages being a substantive right in admiralty, see *Joe Intagliata* v. *Shipowners and Merchants Towboat*

Ltd., 26 C. (2d) 365, 159 P. (2d) 1, unofficially reported in 1946 A. M. C. 263.

It is therefore respectfully submitted that, at most, in admiralty, contribution lies between joint tort feasors and that the U. S. Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901 *et seq.*, has not changed that rule.

POINT V

Admiralty does not have jurisdiction of the non-maritime features of the "Warshipsteve" contract and jurisdiction in admiralty cannot rest upon the fact that the United States is the indemnitee.

The Circuit Court of Appeals, Second Circuit, in its main opinion (153 F. (2d) 605-608), by-passed any discussion as to the jurisdiction of that Court as a Court of admiralty over the contract here involved.

It assumed, by silence, the jurisdiction of that Court in admiralty over the "Warshipsteve" contract, despite the fact that that issue was raised by the pleadings (see Fourth allegation of impleading petition (R. 14) and answer thereto of American Stevedores, Inc., in its Eighth paragraph (R. 16)).

When that Court was apprised, by the petition for limited rehearing (R. 92), of the fact that it had not determined the question of admiralty jurisdiction, it covered the same in a *Per Curiam* opinion (153 F. (2d) 609) in which it said:

> "Nor need we be troubled by doubt as to admiralty jurisdiction extending to a contract of indemnity, since jurisdiction *could* rest on the fact that the indemnitee is the United States, 28 U. S. C. A. 41 (1); see Tuthill v. United States, D. C. N. D. Ill., 38 Fed. 538,

appeal dismissed, 136 U. S. 652, 10 S. Ct. 1075, 34 L. Ed. 557." (Italics supplied.)

Discussion of the above quotation is found at page 51 hereof.

There is a lack of clarity on the jurisdiction of admiralty respecting contracts partly maritime and partly non-maritime. *Robinson on Admiralty*, page 186.

Where the district court sits as a court of admiralty, it must determine at the very outset the power that has been conferred upon it to determine and rule upon the subject matter of the suit in question.

In the instant case, it was incumbent upon the court sitting in admiralty to determine whether the subject matter of the claim against the petitioner-appellant herein was within the admiralty and maritime jurisdiction.

It is not the character of the litigant that confers jurisdiction in admiralty but rather the cause of action or nature thereof.

This has been oft-expressed by this court. In 1920, this Court, through Mr. Justice McReynolds, said in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476, 42 S. Ct. 157, 158:

> "The general doctrine that in contract matters admiralty jurisdiction depends upon the *nature* of the transaction and in tort matters upon the locality, has been so frequently asserted by this Court that it must now be treated as settled. (Citing cases)." (Italics supplied.)

To same effect see:

North Pac. S. S. Co. v. *Hall Bros. Marine Ry. & S. Co.*, 249 U. S. 119.

The difficulty of keeping, separate and distinct, concepts of admiralty jurisdiction and those of common law jurisdiction in our system of federal jurisprudence has been appreciated by many writers. For, as was said by Frederic Cunningham in 18 *Harvard Law Review* 294:

> "It surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the Court undertaking to administer it, or there will be no certainty in the law, and litigation will become a lottery. * * * It will not do for a common law court to proceed in accordance with the admiralty law, nor for an admiralty court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate."

An admiralty court cannot take unto itself, by means of General Admiralty Rule 56, a claim which is not cognizable in admiralty *Aktieselskabet Fido* v. *Lloyd Brasiliero*, 283 F. 62, cert. denied 43 S. Ct. 97.

In the case at bar, American Stevedores, Inc. was impleaded by the United States (R. 14) solely on the indemnity provision contained in an agreement dated July 12, 1942. This agreement is the forerunner of the "Warshipsteve" contract. For the evolution of that contract, see footnote 1 at page 501 of *Compilation of Standard Contract Forms of the War Shipping Administration*, printed 1945 for use of Committee on the Merchant Marine and Fisheries.

As pointed out, *supra*, conflict exists with respect to what is a maritime contract and what is non-maritime.

Mr. Justice Brandeis' views in *Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U. S. 253, 46 S. Ct. 212, were that the

contract must be "wholly maritime" for admiralty to have jurisdiction.

Even if judicial surgery were performed upon this contract, as suggested by Circuit Judge Learned Hand in *Compagnie Francaise de Navigation A. Vapeur* v. *Bonnasse*, 19 F. (2d) 777, certiorari denied, *sub. nom., American Exchange Irving Trust Co.* v. *Bonasse*, 275 U. S. 551, 48 S. Ct. 114, the provisions of indemnity in the "Warshipsteve" contract comprise that part of the contract which is non-maritime.

Further, if exact precedent be necessary for a determination that admiralty does not possess inherent jurisdiction over a contract of indemnity, as is contained within the "Warshipsteve" contract, the Circuit Court needed but to resort to its own case of *The Wonder*, 79 F. (2d) 312, wherein Circuit Judge Augustus N. Hand said (79 F. (2d) at pp. 313, 314):

> "The original contract between the city and E. O. Roberts Company, Inc., provided that the contractor 'should be responsible for all injuries to persons or damage to property either directly or indirectly that may result from his operations for which otherwise the City of New York might be liable'. *The trial court held the city solely liable, and properly refused to enforce the contract to save the latter harmless for the reason that the obligation was not maritime and therefore did not come within the jurisdiction of a court of admiralty.*" (Italics supplied.)

We have heretofore (p. 48) quoted from the Circuit Court's opinion dealing with the proposition that jurisdiction *could* rest upon the fact that the United States was the indemnitee.

In support of its quoted statement, the Circuit Court refers to 28 U. S. C. A. § 41 (1). An examination of that section (Section 24, Judicial Code) shows that it

refers to the United States as plaintiff in "civil suits at *common law or in equity.*" That it does not refer to proceedings in admiralty is apparent, not only from a reading of Section 1 of the enactment, but subsection 3 of the same statute covers "all civil causes of admiralty and maritime jurisdiction". Therefore, jurisdiction of the instant proceeding, in so far as the indemnity clause is concerned, cannot be bottomed on the section of the enactment cited by the Circuit Court in support of its statement as to jurisdiction. *Tuthill* v. *United States*, 38 Fed. 538 (Northern District of Illinois, 1889), appeal dismissed 136 U. S. 652, does not support the quoted statement of the Circuit Court. There, plaintiff instituted suit to recover his claim against the United States for services rendered by him while acting as District Attorney in the Northern District of Illinois. The United States, defendant, sought to off-set or counter-claim for a sum in excess of $1000, which was the jurisdictional amount for which suits could be brought under the statute upon which plaintiff's cause of action was based. The Court, in the cited case, held that the set-off, or counter-claim, would lie.

It is respectfully submitted that no jurisdictional grounds have been found by the Circuit Court of Appeals in this case to sustain the jurisdiction of the court over this contract of so-called indemnity. That the *potentialities* of jurisdiction have their roots in the character of the litigant, as suggested by the use of the word "could" in the above quotation by the Circuit Court of Appeals, indicates the fallacy into which the Circuit Court of Appeals has fallen.

The non-maritime indemnity provision, upon which the United States relies, is beyond the pale of admiralty jurisdiction.

Cases of maritime or non-maritime contracts have nurtured hair-splitting distinctions. 25 *Mich. L. Rev.* 289; 40 *Harvard L. Rev.* 1148; 41 *id.* 792.

If certainty and uniformity of decision is the touchstone in admiralty, this Court should be the mason.

Conclusion

The United States of America, under the Public Vessels Act, did not consent to become suable for a personal injury claim. Sovereign immunity not having been waived by the Act with respect to a personal injury claim, the District Court had no jurisdiction initially to entertain this proceeding.

If this Court should determine that jurisdiction existed under the Public Vessels Act for the assertion of a personal injury claim, the libellant herein has precluded himself from asserting any claim thereunder by reason of his having elected his remedy exclusively under the U. S. Longshoremen's & Harbor Workers' Compensation Act in that he has accepted and retained compensation benefits paid to him under the authority of said Act.

If this Court should determine that the United States of America has consented to be sued under the Public Vessels Act for a personal injury claim and that the libellant's capacity to sue was unimpaired by his acceptance and retention of compensation, nevertheless the District Court, sitting as a court of admiralty, had no jurisdiction to entertain the non-maritime clause of indemnity in the "Warshipsteve" contract and that court, as a court of admiralty, cannot, by means of General Admiralty Rule 56, extend its jurisdiction and encompass a non-maritime contract.

The petitioner herein, under the so-called indemnity clause of the "Warshipsteve" contract, was not called upon to indemnify the United States of America, as shipowner, for the latter's negligence or for the defective condition of its vessel.

The United States of America, as shipowner, is only entitled, at most, to obtain from the appellant contribution for one-half of its damages by virtue of the time-honored substantive rule in admiralty of contribution between joint

tort feasors, which rule has not been changed by the U. S. Longshoremen's & Harbor Workers' Compensation Act.

The decree, appealed from, should be reversed with directions that a decree be entered dismissing the libel.

Respectfully submitted,

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.